

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In re Application of	)	
	)	
MINNESOTA CHRISTIAN	)	File No. BPH-19950601MA
BROADCASTERS, INC.	)	Facility ID No. 76432
	)	
For a Construction Permit for a New FM Station	)	
at Pequot Lakes, Minnesota	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 8, 2003**

**Released: January 17, 2003**

By the Commission:

1. Before the Commission is Carol DeLaHunt's ("DeLaHunt") Application for Review of a decision by the Mass Media Bureau ("Bureau")<sup>1</sup> denying DeLaHunt's Petition for Reconsideration of a staff decision,<sup>2</sup> which denied DeLaHunt's Petition to Deny Minnesota Christian Broadcasters, Inc.'s ("MCBI") application for a construction permit for a new FM broadcast station at Pequot Lakes, Minnesota.<sup>3</sup> For the reasons set forth below, we grant in part and deny in part DeLaHunt's Application for Review, and take this opportunity to clarify the eligibility criteria for the broadcast auction new entrant bidding credit ("NEBC").

2. **Background.** DeLaHunt and MCBI were the only qualified bidders in FM Mutually Exclusive Group 66 in Closed Broadcast Auction No. 25. MCBI placed the winning bid in the October, 1999, auction.<sup>4</sup> DeLaHunt timely filed a petition to deny MCBI's post-auction Form 301 application for the Pequot Lakes construction permit, alleging that MCBI falsely claimed that it was entitled to the NEBC, that MCBI was not financially qualified, and that it falsely certified its financial qualifications.<sup>5</sup>

<sup>1</sup> Letter to Ms. Carol DeLaHunt and Minnesota Christian Broadcasters, Inc. from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, Ref. No. 1800B3-TSN (Sept. 27, 2000) ("Reconsideration Decision").

<sup>2</sup> Letter to Ms. Carol DeLaHunt and Minnesota Christian Broadcasters, Inc. from Linda Blair, Chief, Audio Services Division, Mass Media Bureau, Ref. No. 1800B3-TSN (Feb. 28, 2000) ("Staff Decision").

<sup>3</sup> File No. BPH-19950601MA. MCBI filed Form 301 and paid the applicable filing fee, specifying non-reserved Channel 261A.

<sup>4</sup> Public Notice, "Closed Broadcast Auction No. 25 Closes; 91 Winning Bidders in the Auction of 118 Broadcast Construction Permits," 14 FCC Red 17186, 17197 (1999).

<sup>5</sup> On September 23, 1999, three business days prior to commencement of the auction, DeLaHunt filed a Petition for Declaratory Ruling ("Declaratory Petition"), seeking a declaration that MCBI was not entitled to the thirty-five percent new entrant bidding credit that it claimed in its Form 175, Application to Participate in an FCC Auction. Our broadcast auction rules do not contemplate such pleadings being filed before or during auctions. These issues

(continued...)

The staff denied the petition to deny and DeLaHunt's subsequent petition for reconsideration of that action. DeLaHunt now seeks review.<sup>6</sup>

3. **Discussion.** *New entrant bidding credit.* The standards for determining NEBC eligibility are set forth in Section 73.5007 of our rules:

A thirty-five (35) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have no attributable interest in any other media of mass communications, as defined in § 73.5008. A twenty-five (25) percent bidding credit will be given to a winning bidder if it, and/or any individual or entity with an attributable interest in the winning bidder, have an attributable interest in no more than three mass media facilities. No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast station, or if the winning bidder, and/or any individual or entity with an attributable interest in the winning bidder, have attributable interests in more than three mass media facilities.<sup>7</sup>

“Media of mass communications,” as defined in Section 73.5008(b), include “an AM or FM broadcast station” and attributable interests, as defined in Section 73.5008(c), are to be determined “in accordance with § 73.3555 and Note 2” to that section.<sup>8</sup> At the time MCBI filed its Form 175 application, it was the 100% owner and licensee of stations KCFB(FM), St. Cloud, Minnesota, and KTIG(FM), Pequot Lakes, Minnesota, both licensed as noncommercial educational (“NCE”) stations. The Bureau found MCBI eligible for the NEBC, based on subsection (f) of Section 73.3555 (Multiple Ownership), which then stated that “[t]his section is not applicable to noncommercial educational FM and noncommercial educational TV stations.”<sup>9</sup> The Bureau held that MCBI’s interests in the two NCE stations were not

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were raised again, and fully briefed, in DeLaHunt’s Petition to Deny, and were addressed in the staff decision on that petition. The Declaratory Petition was therefore dismissed as moot. Staff Decision at 1 n.1.

<sup>6</sup> The deadline for petitions to deny in this proceeding was December 13, 1999. *See Public Notice*, “Closed Broadcast Auction Winning Bidder Applications Accepted for Filing, Auction No. 25, Pleading Cycle Established,” 14 FCC Rcd 20677, 20687 (1999). On March 21, 2000, DeLaHunt filed a pleading styled “Further Petition to Deny” in which she presented further evidence regarding her allegations that MCBI was not financially qualified and falsely certified its financial qualifications. The Bureau dismissed this filing as untimely. Congress prescribed and the Commission has adopted a shortened period for filing petitions to deny in broadcast auctions. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order (“Broadcast First Report and Order”)*, 13 FCC Rcd 15920, 15985 (1998) (establishing ten-day time period for petitions). DeLaHunt has failed to demonstrate good cause to depart from filing deadlines that are designed to expedite the introduction of new broadcast services, and in any event the arguments and evidence presented in this pleading were included both in her Petition for Reconsideration and her Application for Review. We therefore affirm the Bureau’s dismissal of the “Further Petition to Deny.”

<sup>7</sup> 47 C.F.R. § 73.5007.

<sup>8</sup> *Id.* § 73.5008(b), (c).

<sup>9</sup> *Id.* § 73.3555(f) (1999).

attributable for purposes of the multiple ownership rules,<sup>10</sup> and therefore were not to be counted in determining MCBI's NEBC eligibility.

4. Both Section 73.5007<sup>11</sup> (Designated entity provisions) and Section 73.5008<sup>12</sup> (Definitions applicable to designated entity provisions) are silent as to whether interests in NCE facilities are to be considered in making the NEBC eligibility determination, and the Commission did not address this question in adopting these rules. The Bureau's determination to disregard such facilities was based on its initial reading of our rules. For the reasons set forth below, however, we find that the rules are more properly read to mean that MCBI's 100% interests in stations KCFB(FM) and KTIG(FM) are cognizable for purposes of the bidding credit.

5. Congress directed the Commission to ensure that certain parties "are given the opportunity to participate in the provision of spectrum-based services."<sup>13</sup> The NEBC was designed in part to carry out this mandate,<sup>14</sup> as well as to promote viewpoint diversity within the media.<sup>15</sup> In the *Broadcast Auctions MO&O*, the Commission further explained its rationale in adopting the NEBC, and clarified and amended the eligibility standards to conform them to the long-standing broadcast attribution standards, by which we define what constitutes a cognizable interest in a medium of mass communication.<sup>16</sup> In so doing, we explained that these standards "are designed to promote diversity in programming services and viewpoints for the broadcast services."<sup>17</sup> These standards were deemed appropriate to promote the goals of the NEBC "because the interests defined as attributable under our general multiple ownership attribution rules have already been judged to give their holders a 'realistic

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<sup>10</sup> DeLaHunt states that both KCFB(FM) and KTIG(FM) operate on "commercial frequencies" and "have previously been operated as commercial stations." Application for Review at 1. Commission records indicate that, in fact, KCFB(FM) operates on reserved Channel 218, and thus must be, and has been, operated as an NCE station. 47 C.F.R. § 73.501. KTIG(FM), operating on non-reserved Channel 274, was licensed as a commercial station until April 1998, when the Bureau granted its modification application to be licensed as an NCE station (File No. BMLD-19980105KC). Since the change to noncommercial operation was made over a year before the Auction 25 Form 175 filing deadline, the staff properly regarded KTIG(FM) as an NCE station for auction purposes. *See Public Notice*, "Closed Broadcast Auction – Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999 – Minimum Opening Bids and Other Procedural Issues," 14 FCC Rcd 10632, 10639 (WTB/MMB 1999) (divestiture or other ownership changes to avoid attribution for new entrant bidding credit purposes must be accomplished by the Form 175 filing deadline).

<sup>11</sup> 47 C.F.R. § 73.5007.

<sup>12</sup> *Id.* § 73.5008.

<sup>13</sup> 47 U.S.C. § 309(j)(4)(D).

<sup>14</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15993-96.

<sup>15</sup> *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Memorandum Opinion and Order*, 14 FCC Rcd 8724, 8763 (1999) ("*Broadcast Auctions MO&O*").

<sup>16</sup> *Broadcast Auctions MO&O*, 14 FCC Rcd at 8761-63.

<sup>17</sup> *Id.* at 8763.

potential' to affect programming or other core functions of broadcast licensees.”<sup>18</sup> We concluded, therefore, that “the interests of the winning bidder (and of any individuals or entities with an attributable interest in the winning bidder) will be attributable for purposes of the new entrant bidding credit *to the same extent that such other media interests are considered attributable for purposes of the broadcast multiple ownership rules.*”<sup>19</sup>

6. This approach is codified in Sections 73.5007 and 73.5008 of the rules.<sup>20</sup> Section 73.5007(a) provides that “[n]o bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast facility.” As to what counts among the winning bidder's other media interests in determining eligibility for a bidding credit, subsection (a) excludes only “[a]ttributable interests held by a winning bidder in existing low power television, television translator or FM translator facilities.” To be eligible for the thirty-five percent bidding credit, MCBI must have “no attributable interest in any other media of mass communications, as defined by section 73.5008.” As noted above, “medium of mass communications,” as defined by Section 73.5008(b), includes an AM or FM broadcast station without any indication that noncommercial educational stations are excluded. An attributable interest in a medium of mass communications, as defined in Section 73.5008(c), is determined “in accordance with Section 73.3555 and Note 2.” Neither Section 73.3555 nor Note 2 specifies that an otherwise attributable interest in a medium of mass communications is disregarded under all circumstances because the facility in question is a noncommercial educational station.<sup>21</sup> At the time of the 1999 auction at issue here, Section 73.3555(f) specified that “[t]his section is not applicable to noncommercial educational FM and noncommercial educational TV stations,” meaning that various ownership limits, such as the local radio ownership rule or the radio-television ownership rule, do not apply to NCE stations. The distinction between what constitutes an attributable interest and the multiple ownership limits is even clearer under current Section 73.3555(f), providing that “[t]he ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations.”<sup>22</sup> Finally, with respect to the general attribution standards, the current rule does not suggest that an NCE station is not attributable for any purpose. Indeed, subsection (f) specifically states that “the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants.” We therefore conclude that the staff's reliance on Section 73.3555(f) was misplaced, and that MCBI is ineligible for any bidding credit.

7. The facts of this case confirm that it is appropriate to count NCE stations as other media for NEBC purposes. This approach will promote the NEBC goal of fostering entry into broadcasting by new participants. A number of NCE licensees own dozens of full-power primary service stations. It makes little sense to treat such licensees as “new entrants.” Under the Commission's rules a licensee may hold both NCE and commercial broadcast authorizations. Moreover, as this case demonstrates, certain

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 8762 (emphasis added).

<sup>20</sup> 47 C.F.R. §§ 73.5007, 73.5008.

<sup>21</sup> See 47 C.F.R. § 73.3555(b)(2)(ii) (providing that full-power noncommercial TV stations are relevant in assessing a commercial television station's compliance with the local television multiple ownership rule).

<sup>22</sup> *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, 15 FCC Rcd 7386 (2000), *order clarified on recon.*, 16 FCC Rcd 5074 (2001), *recon. denied*, 17 FCC Rcd 13132 (2002).

licensees can convert a station via routine application from commercial to NCE status. In these circumstances, drawing distinctions between stations based on their NCE or commercial status would undermine Congress's intent to "disseminat[e] licenses among a wide variety of applicants."<sup>23</sup> As noted by DeLaHunt, NCE stations have been counted as "voices" in connection with requests for waiver of our former (pre-1999) radio-television cross-ownership rule,<sup>24</sup> and are likewise counted in the "voice test" used in applying the current rule.<sup>25</sup> Moreover, the Commission has considered NCE stations in determining the level of service provided to a community in order to implement Section 307(b)<sup>26</sup> and decide which communities should receive a local broadcast service.<sup>27</sup> Similarly, the Commission included NCE service in calculating comparative coverage as part of its former comparative hearing procedures.<sup>28</sup>

8. We thus conclude that full-service NCE stations, on both reserved and non-reserved channels, are included among "media of mass communications" as defined in Section 73.5008(b).<sup>29</sup> We further conclude that all interests held in full-service NCE stations, both ownership and positional,<sup>30</sup> constitute attributable interests within the meaning of Section 73.5008(c) for purposes of determining eligibility under Section 73.5007(a) for a new entrant bidding credit in any broadcast or secondary broadcast service auction.

9. We further conclude that we must apply our clarification of the NEBC rules to MCBF's winning bid for the Pequot Lakes construction permit. In this situation, we start with a presumption in favor of applying the clarification, unless to do so would work a "manifest injustice."<sup>31</sup> The Commission

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<sup>23</sup> 47 U.S.C. § 309(j)(3)(B). We note, moreover, that pursuant to Section 73.5007(c) (which provides that a licensee or permittee who utilized an NEBC to obtain its license or permit, and who acquires after auction an additional facility that would have nullified its NEBC eligibility, is not required to reimburse the U.S. Government for the amount of the NEBC), it is not the case that post-auction changes in the NCE status of broadcast stations previously disregarded for purposes of the bidding credit would result in unjust enrichment penalties.

<sup>24</sup> Under this policy, applicants in the top twenty-five television markets could seek waivers of the cross-ownership rule by showing that at least thirty separately owned, operated, and controlled "voices" would remain in the market post-combination. *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1741, 1750-51, *recon. granted in part and denied in part*, 4 FCC Rcd 6489 (1989). NCE stations were counted in determining the number of independent voices in the community. 4 FCC Rcd at 1751.

<sup>25</sup> 47 C.F.R. § 73.3555(c). See *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12950-51 (1999).

<sup>26</sup> 47 U.S.C. § 307(b).

<sup>27</sup> See *Valley Broadcasters, Inc.*, 5 FCC Rcd 2785, 2788 (1990).

<sup>28</sup> *Channel 32 Broadcasting Co.*, 6 FCC Rcd 5188, 5188-89 (1991).

<sup>29</sup> 47 C.F.R. § 73.5008(b).

<sup>30</sup> Positional interests include officer, director, and investor/creditor under the Commission's "equity/debt plus" standard.

<sup>31</sup> *Verizon Telephone Companies v. F.C.C.*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (citing *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987)).

has not had an opportunity to address this issue previously. Thus, it cannot be said that MCBI relied on settled Commission policy in this area. As noted above,<sup>32</sup> DeLaHunt sought clarification of this issue before the auction, plainly putting MCBI on notice that its claimed NEBC likely would be challenged. Moreover, while MCBI has paid its full net winning bid and the Bureau has issued a construction permit, grant of the permit was expressly conditioned upon timely payment of the balance of MCBI's gross winning auction bid should we find, as we have, that MCBI is ineligible for the claimed NEBC.<sup>33</sup> We cannot say, therefore, that a "manifest injustice" will result from requiring such payment. At the same time, the erroneous claim of a thirty-five percent bidding credit, based on an erroneous reading of section 73.3555(f), does not affect MCBI's basic qualifications, but it must pay the balance of its gross winning bid.<sup>34</sup> Since MCBI's station KTIG(FM) is licensed to Pequot Lakes, MCBI may not claim either the full thirty-five percent or a twenty-five percent NEBC.<sup>35</sup> Accordingly, we order that MCBI is to pay the Commission, within 90 days of the release of this order, the sum of \$74,550, representing the difference between MCBI's gross winning auction bid and its bid net of the claimed thirty five percent NEBC.

10. *Financial Qualifications:* DeLaHunt contends that MCBI is not financially qualified, and thus falsely certified its financial qualifications. She bases her contention on post-auction statements attributed to MCBI principals, in which these principals allegedly stated they were in the process of raising funds needed to make the down payment and final payment on MCBI's winning auction bid. According to DeLaHunt, these statements prove that MCBI was not financially qualified, and she further argues that MCBI had a continuing duty to update its financial certification to reveal its post-auction need for funding. Its failure to do so, asserts DeLaHunt, constitutes a false certification.

11. We reject DeLaHunt's arguments. Her reliance on the reports of MCBI's fund raising efforts is misplaced. As the Bureau explained in the Reconsideration Decision, our sole method of enforcing a winning bidder's financial qualifications – both with respect to auction participation and construction of facilities – is to require timely compliance with the auction payment deadlines.<sup>36</sup> The

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<sup>32</sup> See note 5.

<sup>33</sup> The condition in MCBI's construction permit, granted on March 21, 2002, reads as follows:

GRANT OF THIS PERMIT IS EXPRESSLY CONDITIONED UPON THE OUTCOME OF ANY APPLICATION FOR REVIEW IN CONNECTION WITH PERMITTEE'S APPLICATION, AND ANY SUBSEQUENT ADMINISTRATIVE OR JUDICIAL REVIEW. IF THE COMMISSION OR A COURT OF COMPETENT JURISDICTION FINALLY DETERMINES THAT THE PERMITTEE IS INELIGIBLE FOR THE 35 PERCENT NEW ENTRANT BIDDING CREDIT, OR IS ELIGIBLE FOR A LESSER BIDDING CREDIT, THE PERMIT IS EXPRESSLY CONDITIONED UPON TIMELY PAYMENT, AS DETERMINED BY THE COMMISSION, OF ANY ADDITIONAL PORTION OF ITS GROSS HIGH BID DUE AS A RESULT OF THE LOST OR DIMINISHED BIDDING CREDIT. FAILURE TO COMPLY WITH THIS CONDITION WILL RESULT IN THE AUTOMATIC FORFEITURE OF THIS AUTHORIZATION WITHOUT FURTHER ACTION BY THE COMMISSION. (Capitalization in original.)

<sup>34</sup> See, e.g., *Liberty Productions, a Limited Partnership*, 16 FCC Rcd 12061, 12079 (2001). See also *Baker Creek Communications, L.P.*, 13 FCC Rcd 18709 (WTB 1998).

<sup>35</sup> See 47 C.F.R. § 73.5007(a) ("No bidding credit will be given if any of the commonly owned mass media facilities serve the same area as the proposed broadcast or secondary broadcast station . . .").

<sup>36</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15951-52, 15956, 15989; *Abundant Life, Inc.*, 16 FCC Rcd 4972, 4973-74 (2001).

Commission has determined that it is “unlikely that bidders, who must construct their facilities to recoup the expenditures made in obtaining their construction permits via auction, will have the incentive to participate in and prevail at auction if they lack the financial wherewithal to construct their facilities.”<sup>37</sup> We also held that “[i]t is [the bid payment and default provisions], rather than the original certifications, that serve as a mechanism to discourage insincere proposals.”<sup>38</sup> MCBI has, in fact, made all its required payments in a timely fashion.<sup>39</sup> This ends our inquiry as to its financial qualifications and its allegedly false financial certification.

12. **Conclusion.** For the foregoing reasons, DeLaHunt’s Application for Review IS GRANTED IN PART AND DENIED IN PART to the extent set forth above. IT IS ORDERED that Minnesota Christian Broadcasters, Inc., in order to satisfy the conditional grant of its construction permit, must within 90 days of the release of this Order pay the Commission the sum of \$74,550.00, representing the difference between its gross and net winning bids for the construction permit at Pequot Lakes, Minnesota, in Auction No. 25, File No. BPH-19950601MA. For payment instructions, MCBI must contact the Office of Managing Director, Financial Operations, Auctions Accounting Group.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>37</sup> *Broadcast First Report and Order*, 13 FCC Rcd at 15989.

<sup>38</sup> *Id.* at 15956.

<sup>39</sup> MCBI’s application was placed on a “ready-to-grant” public notice March 7, 2002. *Public Notice*, “FCC Announces It Is Prepared To Grant Broadcast Construction Permits After Final Payment Is Made,” 17 FCC Rcd 4278 (2002). MCBI timely remitted its final payment March 13, 2002; the staff granted the construction permit March 21, 2002, and the station has been assigned call letters WZFJ(FM). The public notice was released pursuant to our direction that henceforth “ready-to-grant” public notices are to be released promptly after staff action on a petition to deny. *Abundant Life, Inc.*, 17 FCC Rcd 4006, 4007 n.5 (2002). DeLaHunt filed a Petition for Reconsideration April 24, 2002, of our public notice announcing grant of the construction permit to MCBI, and dismissal of DeLaHunt’s application. *Public Notice*, “Broadcast Actions,” Report No. 45199 (rel. Mar. 26, 2002).